No. 138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Petitioner*,

v.

AMERICAN FOREIGN STEAMSHIP CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL BRIEF FOR THE RESPONDENT AMERICAN FOREIGN STEAMSHIP CORP.

ARTHUR M. BECKER
839 - 17th Street, N. W.
Washington 6, D. C.
Counsel for Respondent.

GERALD B. GREENWALD
WILLIAM S. STERN
BECKER & MAGUIRE
Washington 6, D. C.
Of Counsel.

April, 1960.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, *Petitioner*,

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL BRIEF FOR THE RESPONDENT AMERICAN-FOREIGN STEAMSHIP CORP.

---

1. The Government in its Reply Brief (p. 5, fn. 2) calls the Court's attention to the Third Circuit cases of *Corabi* v. *Auto Racing, Inc.*, 264 F. 2d 784, and *Jamison* v. *Kammerer*, 264 F. 2d 789, cert. denied, 361 U.S. 813, and the Ninth Circuit case of *United States* v. *Price*, 263 F. 2d 382, rev'd on other grounds, 361 U.S. 304. These cases confirm that the practice in the various

courts of appeals is to permit a member of a court in banc, who retires from regular active service after a case has been committed to the consideration of the court, to participate thereafter in the court's decision.

The Third Circuit cases were argued in banc on December 1, 1958 (264 F. 2d 784; 264 F. 2d 789). Judge Maris, then an active circuit judge of the Third Circuit, was a member of the court in banc which heard both cases. He retired from regular active service on December 31, 1958[1] and thereafter participated in the court's decisions in both cases on February 26, 1959.

In the Ninth Circuit case (*United States* v. *Price*, 263 F. 2d 382), Judge Healy, who retired on November 30, 1958,[2] participated in the court's in banc decision on January 2, 1959. These cases follow the practice of the court below, of the Fifth Circuit, and the earlier decisions of the Third and Ninth Circuits. (See Brief For The Respondent American-Foreign Steamship Corp., pp. 21-23.)

2. The Government argues (Reply Brief, p. 4) that the *Western Pacific Railroad Case*, 345 U.S. 247, held that a retired or assigned judge, who had sat on a panel, might take part in the consideration of a petition for rehearing in banc but could not vote on such a petition.

The question of whether a retired or assigned judge who has sat on a panel may participate in a subsequent rehearing in banc of the case is not the question involved here. We pointed out in our main brief (Brief For The Respondent American-Foreign Steamship

[1] 260 F. 2d ix.

[2] 259 F. 2d xv.

Corp., pp. 31-32) that a court of appeals might assign the entire function of initiating a rehearing in banc to a panel consisting of one circuit and two district judges. This was in refutation of the Government's conclusion that a supposed statutory prohibition against the consideration by retired circuit judges and district judges of petitions for rehearing in banc from panel decisions in which they participated showed a Congressional purpose to exclude such judges from *any* participation in in banc proceedings. (Govt. Brief, pp. 12, 17, 23.)

While we do not wish to engage in extensive combat with the straw man the Government has created, we point out that this Court did decide in the *Western Pacific Railroad Case*, that:

> "A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing in banc to the three judges who are selected to hear the case." (345 U.S. at 259);

that this Court noted that:

> "Two judges on the panel were district judges" (345 U.S. at 263);

and that it reversed the decision of the court of appeals because those judges apparently acted on the theory that they lacked authority to act on the petition for rehearing in banc. (345 U.S. at 265) Moreover, Mr. Justice Frankfurter, in his concurring opinion, interpreted the Court's decision as holding that a court of appeals might

> "allow the discretionary function under § 46(c) to be discharged *definitively* by the panel whose

judgment may call for en banc action." (345 U.S. at 272; emphasis supplied.)

3. We do not assert, as the Government says we do (Govt. Reply Brief, p. 9), "that Section 46(c), if read literally, would create delays and other undesirable results". Section 46(c) does *not* provide that in banc cases must be determined by active circuit judges of the circuit (Brief For The Respondent American-Foreign Steamship Corp., p. 18). We urge that there are compelling reasons of policy why such a requirement should not be read into the statute so as to overrule the practice of *all* courts in cases involving questions which are the same in principle as the question involved in this case. (Brief For The Respondent American-Foreign Steamship Corp., Point I.)

4. The Government says that it regards our statement of facts, which it admits is the same as that set forth in the opinion of the court below, as inaccurate (Reply Brief, p. 11, fn. 10). The statement of facts is based upon the verified amended libel and the affidavits supporting its allegations filed in the district court (R. 1-23). The Government, in support of its motion to dismiss the amended libel for lack of jurisdiction, filed only an unverified exception reading as follows:

> "This [District] Court lacks jurisdiction over the subject matter of this suit and over the respondent for the reason that this suit was not commenced within two years after the cause of action alleged in the libel arose, as required under Section 5 of the Suits in Admiralty Act, 46 U.S.C. 745." (R. 17)

Upon the basis of this allegation the Government asked the court below to speculate (R. 124) and now

implies that this Court should speculate as to the existence of a state of facts which, if established, would deprive the district court of jurisdiction under the Suits in Admiralty Act (46 U.S.C. 741 *et seq.*). Cf. *Railway Express Agency, Inc.* v. *Jones*, 106 F. 2d 341, 343 (7th Cir.) If such facts exist the Government should accept the invitation of the court below (R. 124) and allege and attempt to prove them.[3] In the absence of any such allegations and proof, the court below properly assumed the truth of the allegations of the amended libel and its supporting affidavits for the purpose of ascertaining whether the amended libel stated a cause of action within the jurisdiction of the district court. (*Postal Telegraph Co.* v. *City of Newport*, 247 U.S. 464, 474.)

Respectfully submitted,

ARTHUR M. BECKER
839 - 17th Street, N. W.
Washington 6, D. C.
Counsel for Respondent.

GERALD B. GREENWALD
WILLIAM S. STERN
BECKER & MAGUIRE
Washington 6, D. C.
Of Counsel.

April, 1960.

[3] As we pointed out in our main brief (Br. for The Respondent American-Foreign Steamship Corp. p. 12, fn. 9) the Government, in its answer filed one year after the in banc decision of the court below, did not allege the facts which, in its brief on rehearing, it asked the court below to assume were true.